IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2009 Session

ARLIE OVERTON, ET AL. v. HILDA GAY LOWE, ET AL.

Appeal from the Circuit Court for Scott County
No. 5237 John McAfee, Circuit Judge

No. E2007-00843-COA-R3-CV - FILED JUNE 30, 2009

In this unfortunate case, mother and father and sisters and brother, and spouses, have sued sisters and one spouse to recover the family farm and the family home place. The problem dates back to a deed made in 1985 to avoid a foreclosure sale and one made in 1986 conveying the property to the defendants. Defendants now seek to overturn a judgment entered on a jury verdict in favor of the plaintiffs. The jury found that defendants acquired title to the two properties by fraud and breached an agreement to reconvey the property back to the plaintiffs at some point in time. After the case was tried before Circuit Judge Conrad Troutman, he retired leaving incoming Judge John McAfee to deal with post-trial motions. The dispositive issues are whether Judge McAfee was able, under the circumstances, to adequately fulfill his role as thirteenth juror, whether defendants should have been granted a directed verdict on some or all of the claims and whether the defendants should have been allowed to amend their answer and argue that the statute of limitations had run on plaintiffs' claims before this lawsuit was filed in 1999. We vacate the trial court's judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Stephen A. Marcum, Huntsville, Tennessee, for the appellants, Hilda Gay Lowe, Audie Dean Lowe and Sheilda May Mills.

Johnny V. Dunaway, LaFollette, Tennessee, for the appellees, Arlie Overton, Novella Overton, Shairon Fay Howard, Paul David Howard, Derita Kay McCulloch, Casey McCulloch, Arlie Dennis Overton and Karen Overton.

OPINION

I.

A.

In this family quarrel, we begin by identifying the participants. Plaintiff Arlie Overton is the father of the clan. Plaintiff Novell Overton is Arlie's wife and the mother of the clan. Plaintiff Arlie Dennis Overton is the son of Arlie and Novella. He is sometimes called Dennis to distinguish him from his father. Plaintiffs Shairon Fay Howard and Derita Kay McCulloch are the daughters of Arlie and Novella. The other plaintiffs are spouses of Dennis, Shairon and Derita.[1] Defendant Hilda Gay Lowe is the daughter of Arlie and Novella. Defendant Audie Dean Lowe is Hilda's husband. Defendant Sheilda May Mills is the daughter of Arlie and Novella.

In 1976, the parents borrowed money to build a house on the family farm and gave a deed of trust to lender Production Credit Association (PCA) on both the farm, a 275 acre tract, and the family home place, a 25 acre tract. By 1982 Arlie had become indebted to Arlie Dennis Overton and executed a deed of trust to him to secure the debt. In 1984, Arlie signed a warranty deed to Dennis. Novella signed neither.

The parents fell behind in their payments to PCA and were facing foreclosure in 1985.[2] To avoid foreclosure, the adult children of Arlie and Novella took the property in their names[3], executed a new note[4] to Progressive Savings and Loan Association in the amount of $36,189.86, and signed a deed of trust to Progressive covering both properties as security. The closing took place at Progressive's Wartburg office in 1985.

What happened at the closing, and what generated a 1986 conveyance into defendants from the siblings are the subject of much dispute, depending on who tells the story and when it was told. A summary of who said what and when will be useful in making some sense of this family feud brought to court.

---

[1]There is some uncertainty that is immaterial for the purpose of this opinion about whether some of the names listed as plaintiffs/appellees remain parties. Arlie died before trial and Novella died after trial but before this appeal could be heard. Apparently some of the spouses were dismissed as plaintiffs. We have simply followed counsel's lead as to whom he represents, and tried to account for all the parties.

[2]The notice of foreclosure is trial exhibit 8.

[3]Since Dennis had a deed to the 25 acre tract, Dennis and wife executed a deed to himself and his siblings on that tract. Also, the spouses of the siblings were included as parties on some conveyances. We are limiting our reference to the siblings unless the context requires otherwise.

[4]The Note is trial exhibit 19. The named borrower is Hilda Gay Lowe, but it is endorsed by Derita, Sheilda and Hilda.

Plaintiff Arlie Overton, Father

Arlie died before trial and his deposition testimony taken by defendants' counsel was read to the jury during plaintiffs' case. He admitted experiencing memory problems as the apparent result of a stroke. He could not remember where the 1985 documents were signed and admitted problems with specifics, often shaming adverse counsel for "riding" him and advising counsel that his wife Novella could answer his questions. Despite his admitted memory problems and his inability to furnish specifics about who said what to whom, Arlie testified repeatedly that the understanding was that the children would sign the property back when the parents were able to take it back. The following exchange is typical:

> Q: Well, whose idea was it for the kids to help with the bank note? Was it the bank's idea, or was it yours, or was it one of the kids?
>
> A: Well, they jumped up to do that, you know, the kids did, and then it come down to this deal here. Can you imagine? I've learned so much since I got into this. Can you imagine them taking old dad and mother's property and getting out here and borrowing a hundred thousand dollars against it? That ain't nothing. They've all got these big five thousand dollar fourwheelers, four thousand, stuff like, got them all. I guess they've got maybe six or eight of them in the family and all like that. That's stepping big and me on starvation.
>
> Q: Before the day that everybody went down to the bank in 1985, did you ever talk to Audie Dean or Hilda or Sheilda about how it was all going to be set up?
>
> A: No, I didn't.

Arlie Overton testified that at some point in time he tried to pay on the notes at Progressive's Jamestown location but Progressive would not take his money. Arlie Overton and Casey McColluch took some documents out of state to his son Dennis and his daughter Shairon to sign. Arlie understood the documents to be an oil and gas lease, but he could not recall whose idea it was to lease the property for drilling, who furnished the documents, or whether he talked with the defendants before taking the documents for execution. He could not recall whether the 1986 deed into the defendants was contained in the documents he delivered for signature, but testified that the quantity of documents he delivered was less than those being referred to at trial.

Plaintiff Novella Overton, Mother

Novella graduated from the eighth grade and acknowledged being able to read and write. When faced with foreclosure, she and Arlie owed about $20,000 on property that, in her opinion[5], was worth approximately $130,000. When asked about the 1985 deed on direct, she testified as follows:

> And we went in, and we signed that. And everybody signed it. And we come out, and I was just about killed. Audie Dean followed me out, and I said, "Derita, that just kills me." I said, "I've just signed about everything I've got away. I'm afraid they won't sign it back." He [Audie] said, . . . "Lucky[6], don't worry about a thing. They won't be one thing done on that place until you and Arlie – whenever you want it back, we'll sign it back to you like you signed it to us. They'll not be one thing done on it."

In her deposition, as brought out on cross-examination, Novella had testified that there was no agreement concerning what would happen if Arlie could not get back on his feet financially. Additionally, Novella testified that she did not know that her name and Arlie's were being left off the 1985 deed. Novella testified that she did not know there was a 1986 deed, but thought there was to be an oil and gas lease in that time frame, taken by Arlie to have the children that lived in Kentucky and Virginia (Shairon and Dennis) sign. The proceeds of the lease were to be applied to the loan against the property. Novella testified that Arlie made several payments to the defendants to be applied to the principal owed, but admitted making no regular payments on either the loan or taxes since 1985.

Plaintiff Derita McColluch, Daughter

Derita testified that Audie promised Novella in Derita's presence, outside the bank after the closing, that he would return the property "when you and Arlie want it." Derita differed from Novella only in her recollection of the persons present. Derita, however, did admit in her deposition, as pointed out on cross-examination, that there was not a firm agreement as to "if or when" the property would be given back. Derita can read and write but did not read the documents she signed in 1986 because she trusted her sister Hilda. She acknowledged her signature on the 1986 deed, but thought she was signing an oil and gas lease that was not as bulky as the documents presented at trial. Derita could not say that defendants had presented her the lease documents to sign or had sent her father to obtain her signature. Derita did not make any payments on the loan after 1986, supposedly because she understood the oil and gas lease was drawing royalties that were being applied to the loan.

---

[5]Plaintiffs put on testimony through an expert appraisal that the property, in1985, would have been worth approximately $109,000.

[6]Lucky is Novella's nickname given by Arlie because, in his eyes, she was lucky to have married him.

Plaintiff Shairon Howard, Daughter

Shairon Howard is a teacher and social worker with a bachelor's degree. She did not read any of the documents she signed but did not deny her signature on the pertinent documents. A fair reading of her testimony concerning the 1985 deed and loan is that while there was no specific discussion or agreement as to how it would be handled, it was understood by all that the children were doing this to save the property for the parents and not to take the property for themselves. She heard Audie's remarks to Novella outside the bank. Shairon made some payments to Hilda on the loan between 1985 and 1986, but no payments after 1986. She did not make any payments after 1986 either on the loan or the taxes because she thought there was an oil lease in place that was covering the obligation. Shairon testified she did not know she signed a deed in 1986, though she admitted the documents reflected that she appeared before a notary and signed the deed. The only document that she intended to sign in 1986 was an oil lease that she remembered to be a two page document brought to her by her daddy. She did not talk to her sisters concerning the documents to be signed in 1986 and understood the oil lease to be her father's idea. She was allowed to speculate that her sisters "tricked" her daddy into presenting her with a deed hidden in the lease papers. However, on cross examination, she admitted that the allegation in the complaint that "Defendants have perpetrated a fraud upon the Plaintiffs by obtaining their signature on a Warranty Deed while making a material misrepresentation that it was an oil and gas lease," was not true.

Plaintiff Arlie Dennis Overton, Son

Dennis admitted signing his deed on the 25 acres over to the group in 1985 for the purpose of obtaining a loan which all the children would undertake to pay back. It was not his intention in the 1985 transaction to take the 275 acre property from his parents. As concerning the 1986 conveyance, Dennis admitted signing documents in West Virginia before a notary that he knew personally. The documents were brought to him by his father, and he understood that he was signing an oil and gas lease. He had previously been furnished a copy of the lease through the mail by his sister Hilda. The unsigned copy was received into evidence as trial exhibit 22, but there is no signed version of the lease in the record. Dennis brought the unsigned version to court, but testified in his deposition that he kept a signed copy of the documents at his home. Dennis did not read the documents he signed because his father was in a hurry. At his deposition Dennis admitted not knowing the heading at the top of the documents he signed, but claimed at trial to be "refreshed" so that he specifically remembered signing a lease. In the two depositions he gave, Dennis said one time that he did not talk to Hilda before the signing and another time that he did. At trial, however, Dennis testified unequivocally that Hilda called him and advised she was sending her father up with lease papers to sign that would help cover the mortgage payments.

Defendant Hilda Gay Lowe, Daughter

Hilda was called as an adverse witness by deposition, and she testified live at trial. According to Hilda, Arlie approached Audie about taking a loan to save the property from foreclosure. Hilda came up with the structure of the conveyance of the property into the adult children and a loan secured by the property to be paid back by all the children. The parents' names were left off the new deeds because they had proven unable to pay. It was understood that if the parents could pay the loan, they could have the property back, but this understanding was limited to the first year. Hilda denied ever receiving any money from her father to be applied to the loan. Only three payments were made in the year after the 1985 loan, and Hilda was unwilling to try to continue the joint effort for those that were unwilling to pay. Hilda admitted sending her father to secure her siblings' signatures on the 1986 deed but claims that everyone knew and understood what was happening. Hilda claimed she talked to the other siblings and they had other interests and were unable to make the necessary payments.

Defendant Sheilda May Mills, Daughter

The only testimony from Sheilda Mills was by deposition, read during plaintiffs' case. In 1985, Sheilda along with Hilda and Audie sought a loan for the sole purpose of saving the property from foreclosure. The transaction involved no payment to the parents for the land and no payment to Dennis for the 25 acres. The defendants told the parents that whenever they got back on their feet, they could have the property back, limited to the first year after the transaction. Sheilda admitted, however, that she never told her parents that they could not have the property back until the big argument in 1999 that resulted in the lawsuit. Sheilda did not directly address the 1986 deed, but she did testify that when she was accused of taking the land away from the plaintiffs she responded, "We've paid for everything we've got, and we've worked hard for it, and they had their chance to pay in it just like we did but they signed their name off, didn't want to have nothing to do with it."

Defendant Audie Dean Lowe, Son-in-Law

Audie unequivocally denied telling his mother-in-law outside the bank, or anywhere for that matter, that she could have the property back. In the year after the 1985 deed into all the adult children, only three payments had been made and the bank was ready to foreclose. The bank agreed to make a new loan to the defendants but only if the co-owners would deed them the property. That is the reason for the 1986 deed.

B.

From 1986 to 1999 the parties co-existed peacefully. Novella lived in a home on the farm tract. Defendants covered the mortgage and real estate taxes. When a small fraction of the property was taken for a public improvement, defendants handled the transaction and kept the money. Defendants made subsequent and additional loans using the property as collateral. At the time of the trial approximately $50,000 was owed against the property compared to the $20,000 to $30,000 owed by the parents in 1985. Defendants spent money on the property and made some improvements. In fact, the discontent between the parties came to a head when Arlie saw Audie sowing seed on the

farm. Arlie, fired up his tractor and commenced to plow up Audie's freshly planted field. Heated words were exchanged which quickly led to a physical altercation between Shairon and Hilda. Plaintiffs' camp insisted that it was tired of defendants acting like they owned the place. Defendants' camp insisted that they did own the place. Somewhere in the mix, Novella asked for the property back. Soon afterward, on advice of counsel, defendants mailed a notice of eviction to Novella. There was considerable, but conflicting, testimony elicited at trial concerning when plaintiffs knew or should have known that defendants were claiming the property adversely to the plaintiffs.

C.

The plaintiffs filed their complaint on June 28, 1999. Defendants denied the allegations of the complaint and asserted in a counterclaim that if judgment were rendered for the plaintiffs, then defendants were entitled to recover money spent preserving and improving the property. On February 7, 2002, defendants moved to amend their answer to plead the affirmative defense of statute of limitations. The motion was set for hearing by notice on April 15, 2002. By letter dated April 15, 2002, the existing trial date of April 24, 2002, was continued to July 30 and 31, 2002. The record reflects no order disposing of the motion to amend, but the parties agree that the motion was orally denied. The motion was reasserted on the day of trial just before the trial and denied on the record. It was also reasserted after the trial as a basis for a new trial and/or a defense judgment notwithstanding the verdict. In other preliminary matters, counsel agreed, with the court's concurrence, to allow the trial judge, rather than the jury, to rule on the counterclaim.

The case was not tried until October 30 and 31, 2003. Judge Conrad Troutman presided over the trial. At the conclusion of plaintiffs' proof, defendants moved for a directed verdict on the grounds that plaintiffs had neither proven their fraud claim nor an agreement to reconvey. The court denied the motion with leave to reassert it at the end of all proof. The trial court denied the renewed motion and submitted the case to the jury. The jury returned a special verdict responding affirmatively that the defendants breached an agreement to reconvey, that the defendants were guilty of fraud, deceit or misrepresentation, that the 272 acre tract[7] should be returned to Novella, and that the 25 acre tract should be returned to Dennis.

After the trial but before entry of judgment, defendants moved the court to allow the motion to amend and to allow the pleadings to be amended to conform to the evidence. The court denied the motions.

Judge Troutman resigned from the bench effective May 31, 2004, without having entered judgment or announced a verdict on the counterclaim. In fact, Judge Troutman did not ever rule on

[7]The parties have not explained why the verdict form referenced 272 acres instead of 275 acres, but the discrepancy is not material to this appeal.

the counterclaim. His last official act in this case was to sign a "Preliminary Judgment" filed August 16, 2004, that reflected the findings of the jury and provided for a future hearing on the counterclaim.

Once Judge McAfee took the bench, defendants moved for a mistrial arguing that it would be improper for another judge to rule on their counterclaim. The court denied the motion for mistrial, and, over defendants' objection, heard argument and ruled on defendants' counterclaim. The court entered judgment incorporating the preliminary judgment and granting a monetary award in favor of defendants for $80,613.49.

Defendants filed timely post trial motions asking for directed verdict, judgment notwithstanding the verdict and a new trial. Defendants specifically argued that the plaintiffs had not introduced material evidence to prove fraud or an agreement to reconvey and that the judge should grant a new trial as the thirteenth juror.[8] Defendants also asserted the failure to allow the amendment to include the statute of limitations as a ground for reversal.

The court heard argument on the post trial motions March 6, 2007. The record contains a transcript of that hearing. Without comment whether he agreed or disagreed with the jury verdict or whether he had considered and weighed the evidence, Judge McAfee denied all motions relative to the jury verdict. However, he granted defendants' motion for new trial on the counterclaim. The court entered an order reflecting its rulings on the post-trial motions on March 26, 2007. In an abundance of caution, the court certified its rulings as final pursuant to Tennessee Rule of Civil Procedure 54.02[9]. This timely appeal followed.

II.

A.

Defendants raise three issues on appeal which we paraphrase as follows:

> Did the trial court err in denying defendants' motion to amend to assert the applicable statute of limitations as a defense?

---

[8] It is more accurate to say that at the hearing defendants argued that the court must grant a new trial because, among other things, it was impossible for Judge McAfee to rule as a thirteenth juror since he did not conduct the trial or see the witnesses.

[9] Rule 54.02, Tenn. R. Civ. P. provides in pertinent part:

> When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

> Did the trial court err in denying defendants' motion for directed verdict?
>
> Are defendants entitled to a new trial under this state's thirteenth juror rule?

B.

These various issues are reviewed under differing standards.

A trial court's ruling on a motion to amend pleadings is reviewed for an abuse of discretion. ***Newcomb v. Kohler Company***, 222 S.W.3d 368, 384 (Tenn. Ct. App. 2006); ***Daniels v. Wray***, 2009 WL 1438247 (Tenn. Ct. App., E.S., filed May 21, 2009). A trial court abuses its discretion when it applies an incorrect standard, makes a decision that is against logic, or applies reasoning that causes an injustice to the party complaining. ***Wray***, at *3 (citing ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001)). A trial court must exercise its discretion in light of recognized factors and a longstanding policy that disputes be resolved on their merits rather than technicalities. ***Newcomb***, 222 S.W.3d at 384.

The beginning point for our review of denial of a motion for directed verdict is Rule 13(d) of the Tennessee Rules of Appellate Procedure. There must be "material evidence to support the verdict." ***Id***.:

> In reviewing the trial court's decision to deny a motion for a directed verdict an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence. . . . Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied.

Johnson v. Tennessee Farmers Mutual Ins., 205 S.W.3d 365, 370 (Tenn. 2006)(citations omitted).

In ***Shivers v. Ramsey***, 937 S.W.2d 945 (Tenn. Ct. App. 1996), we set forth the standard of review of a trial court's denial of a motion for new trial:

> We first note that our standard of review is limited to a determination of whether there is any material evidence to support a jury verdict. We would further point out, however, that this standard is not applicable unless the trial judge properly fulfills his duty as a "thirteenth juror." In this state the trial judge is the thirteenth juror and no verdict is valid until approved by the trial judge. In this capacity the trial judge is

> under a duty to independently weigh the evidence and determine whether the evidence preponderates in favor of or against the verdict. If in discharging his duty as thirteenth juror, the trial judge makes comments that indicate that he has misconceived his duty or clearly has not followed it, this court must reverse and remand the case for a new trial [the material evidence rule notwithstanding].

Id. at 947 (brackets in original; citation omitted).

III.

A.

We first address the argument that we must grant a new trial because of Judge McAfee's inability to fulfill his duty as thirteenth juror. "As the thirteenth juror, the trial judge is required to approve or disapprove the verdict, to independently weigh the evidence, and to determine whether the evidence preponderates in favor of or against the jury verdict." ***Loeffler v Kjellgren***, 884 S.W.2d 463, 468-69 (Tenn. Ct. App. 1994); *see* ***Ridings v. Norfolk Southern Ry. Co.***, 894 S.W.2d 281, 288 (Tenn. Ct. App. 1994). Having no opinion is not an option. ***Sherlin v. Roberson***, 551 S.W.2d 700, 701 (Tenn. Ct. App. 1976). To approve the verdict is to "reach[] the same verdict as the jury after independently weighing the evidence and passing upon the issues." ***Holden v. Rannick***, 682 S.W.2d 903, 906 (Tenn. 1984). Normally, if the trial judge expressly approves the verdict, an appellate court will presume that the judge adequately performed his or her function as thirteenth juror, but other comments made by the trial judge will not be disregarded by the appellate court. ***Id.*** at 905; ***Miller v. Doe***, 873 S.W.2d 346, 349-50 (Tenn. Ct. App. 1993). We thus arrive at the conclusion that a judge who does not see and hear the witnesses is at a significant disadvantage as thirteenth juror and absent strong indications he still found a way to independently weigh the evidence we should set aside the judgment and order a new trial. *See* Tenn. R. Civ. P 63, 1993 Advisory Commission Comment, *citing* ***State v. Bilbrey***, 858 S.W.2d 911 (Tenn. Crim. App. 1993). This is especially true in a case such as the one before the court where the credibility of the witnesses is important.

In light of these standards, given that he did not preside over the trial and see or hear the witnesses, we believe Judge McAfee faced an almost impossible task, one that we cannot say he was able to fulfill. Comments on the jury verdict are sparse and must be gleaned to find anything of significance. Judge McAfee neither expressly approved, nor expressly disapproved, the verdict. Further he recognized the inherent difficulty of trying to make assessments based on testimony that he did not hear. It is notable that all evidence for the counterclaim was heard during the same trial that produced the jury verdict. Judge McAfee did not state, anywhere that we can find in the hearing transcript, that he did in fact review the complete record. On the contrary, his limited comments indicate reliance on submissions of counsel. Finally, his limited comments indicate a deferral to the jury, rather than an independent opinion of his own. Judge McAfee alluded to no "glaring" defect and noted that "[a]s far as the case that was resolved by the jury, the suit to set aside the Deeds, any Motions in reference to that [are] denied." We offer these observations, not to be critical, but as the only support we can find in the record as to how he handled or failed to handle the role of thirteenth juror that was thrust upon him.

Before leaving this issue we note that ***Shofner v. Shofner***, 181 S.W.3d 703 (Tenn. Ct. App. 2004) compels or at least supports the result we reach for reasons that were not mentioned by either party. Tenn. R. Civ. P. 63[10] directly addresses the ability of a successor judge to proceed and the actions that must be taken if he does. "The decisions construing Tenn. R. Civ. P. 63 and its federal counterpart make it clear that if a successor trial judge decides to permit a legal proceeding to continue, the judge must consider and dispose of any post-trial motions made either before or during the successor judge's involvement in the case. If the successor judge is satisfied that he or she cannot perform the duties imposed by the procedural rules with respect to the particular case, the successor judge is empowered to and must order a new trial." ***Shofner***, 181 S.W.3d at 714. Before reaching this step, which is where Judge McAfee found himself, the trial judge must take the mandatory first step of certifying familiarity with the record and the ability to continue the proceeding without prejudice to the parties. ***Id.*** at 712. "[T]here is no room for discretion regarding compliance with Tenn. R. Civ. P. 63. The plain language of the rule demonstrates that it applies to all cases in which a successor trial judge replaces a trial judge who is unable to proceed." ***Id.*** Thus, the holding in ***Shofner*** regarding a trial judge who did not make a certification was as follows: "Accordingly, the successor trial judge had a duty to comply with Tenn. R. Civ. P. 63 whether requested to do so or not. It necessarily follows that she erred by presiding over the case without either ordering a retrial or certifying that she was familiar with the record of the prior proceeding and that continuing the proceeding without a retrial would not prejudice the parties." ***Id.***

Neither of the parties has mentioned ***Shofner*** in the appellate briefs, much less whether the trial judge made the requisite certification. We have been furnished the complete transcript of the March 6, 2007, hearing which produced the ruling on the various post-trial motions and there is no Rule 63 certification or mention of a certification in that transcript. Apparently March 6, 2007, was not the only hearing held by Judge McAfee, so it is possible there is a certification that has not been brought to our attention. We suspect there was no Rule 63 certification. We need not struggle over that possibility. It is sufficient in the context of the unusual circumstances of this case to say that even if he made such a certification, we would overrule it for the reasons we have already stated concerning the procedural requirement of weighing the evidence and approving the verdict as thirteenth juror.

We conclude that Judge McAfee erred in not ordering a new trial. Normally, this holding would generate a new trial on all issues. However, defendant has advanced other arguments that potentially impact the scope of a new trial.

B.

[10] Rule 63 states in pertinent part:

> If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties.

Defendants argue that the trial court erred and we must order a defense judgment because there was no material evidence to support a finding of an agreement to reconvey the property, or that defendants induced their siblings' signatures on the 1986 deed by some form of fraud, deceit or misrepresentation. If defendants are correct on either point then a new trial will not be necessary on that claim. We agree with defendants on the fraud claim.

1.

As pleaded in the complaint, the fraud, deceit and misrepresentation was:

> That Defendants presented Shairon Fay Howard, Derita Kay McCulloch and Arlie Dennis Overton with documents they represented to be oil and gas leases and requested them to sign. The Defendants gave Arlie Overton documents to transport to his children, Shairon, Derita and Dennis for execution. They represented to him that these documents were an oil and gas lease. Based upon these representations, Shairon Fay Howard, Derita Kay McCulloch and Arlie Dennis Overton executed what they believed were oil and gas leases. . . . Recently, however, Plaintiffs have discovered that they were deceived by Defendants and the documents they executed were warranty deeds transferring title for both tracts of real property into the names of Defendants.

Defendants argue that there is a lack of material evidence, pointing specifically to the testimony of the witnesses and to inconsistencies between their trial testimony and deposition testimony. Plaintiffs respond more generally with the argument that the defendants misrepresented the contents of the documents just as they alleged in their complaint. We agree with defendants that when the self-cancelling testimony is disregarded there is no material evidence that the signatures on the 1986 deed were procured by trickery or misrepresentation.

The parties stipulated there was no alteration of the documents. The signatures of the sibling plaintiffs on the 1986 deed were notarized. None of the plaintiffs denied his or her signature on the deed. All the plaintiffs, including one that has or is working on her masters, admitted the ability to read and write and distinguish a deed from a lease but testified that they did not read the documents they signed. Most admitted that they did not even know what they signed, and Dennis testified both that he did and he did not. There was some intimation by the plaintiffs' counsel at trial that documents may have been substituted, but no evidence other than plaintiffs claims that they did not remember signing deeds, and Dennis' claim that he remembered signing a lease, possibly with other documents.

We believe, also, that there is a more fundamental problem in allowing a verdict to stand based on fraud or misrepresentation inducing the plaintiffs to sign the deed that they did not bother to read or examine. Defendants argue that plaintiffs are presumed to have read the document and charged with knowledge of its contents. Presumptions may be overcome, and often are. Plaintiffs argue that the misrepresentations void the deed. The problem here is akin to the problem addressed in ***Solomon v. First American Nat. Bank***, 774 S.W.2d 935, 943 (Tenn. Ct. App 1989). In ***Solomon***, a guarantor

sued the bank for misrepresenting the nature of the guaranty that she signed without reading and prevailed at trial. This court reversed the judgment.

> To recover for fraud, a party must have acted in reliance upon the other party's misrepresentations or failure to disclose the facts.
>
> Generally, a party dealing on equal terms with another is not justified in relying upon representations where the means of knowledge are readily within his reach.
>
> Ordinarily, one having the ability and opportunity to inform himself of the contents of a writing before he executes it will not be allowed to avoid it by showing that he was ignorant of its contents or that he failed to read it.
>
> In ***Dornholz v. Home of Daughters of Jacob for Aged Hebrew***, Mun. Ct., 19 N.Y.S.2d 17 (1940), it was held that an oral representation that a written instrument contained different terms from those which were actually contained in it were not actionable fraud since the person to whom the representation was made was presumed to have read the writing and could not be said to have relied on the oral representation of its contents. It was also held that failure to read a contract before signing it is gross negligence and should prevent the person guilty of such negligence from setting up that the writing contained terms other than those she believed it to contain.
>
> * * *
>
> In ***Haviland v. Southern California Edison Co.***, 172 Cal. 601, 158 P. 328 (1916) it was held that an employee signing a release in his possession could not avoid the release by claiming that the employer misrepresented the contents or effect of the release.
>
> Under the circumstances of this case and the authorities cited, this Court concludes that any misrepresentation as to the contents of the guaranty agreement was not actionable fraud. . . .

Solomon, 774 S.W.2d at 943 (some citations omitted). We believe ***Solomon*** supplies the answers to the alleged fraud in connection with the 1986 deed.[11] We hold that the trial court should have granted

[11]There are exceptions to the holding of ***Solomon***, such as in ***Bagby v. Carrico***, 1997 WL 772877 (Tenn. Ct. App., E.S., filed Dec. 9, 1997), where the correct answer to the misrepresentation might have been had from other documents and the defendant lulled the plaintiff away from the correct answer with other misrepresentations, but the court has not been furnished with any authority where fraud was maintained over the actual contents of documents that (continued...)

the renewed motion for directed verdict at the end of proof on the fraud, misrepresentation and deceit claim.

2.

We turn now to the issue of whether there was material evidence to support the finding of an agreement to reconvey. Every single witness, with the possible exception of Audie Lowe, admitted that the 1985 conveyance was done with the proviso that the parents could have the property back if they could afford it during the first year thereafter. Taking the strongest view of the evidence in plaintiffs favor, there was no such one year limitation on the ability of the parents to redeem. Defendant Sheilda admitted that at no time did she apprise her parents that their time was up and the ability to redeem over. The disparity between the loan undertaken by the defendants in the $30,000 range and the worth of the property in the range of $100,000 was additional proof to support the finding of an agreement to reconvey. Plaintiffs' theory as presented and argued was that at least in 1985 the defendants took the title in trust for the group.

A more interesting question is whether the agreement to reconvey survived the 1986 deed. Plaintiffs' fraud argument notwithstanding, even it they knowingly signed deeds into their siblings in 1986, they could have believed that the deeds were in trust for the parents, or the whole family, just as the 1985 deed was for the parents or the family. It does seem questionable that plaintiffs could expect defendants, who were themselves people of limited means, to struggle for over a decade with the mortgage payments, but this problem is addressed somewhat with evidence that plaintiffs thought payments were being covered by lease proceeds. Morever, it is not this court's prerogative in reviewing a motion for directed verdict to weigh the evidence. We believe there was material evidence of an agreement to reconvey. This will be the only claim for submission when the new trial is held.

C.

In light of our rulings above, we decline to decide whether defendants were prejudiced by an alleged error of the trial court in denying defendants motion to amend to assert the "applicable statute of limitations." We note that our task in that regard would be complicated because there was no order entered after the motion was apparently heard on April 15, 2002, when the case was set for trial on April 24, 2002. Since the case did not go to trial until October 30, 2003, we are puzzled at how plaintiffs could have been prejudiced by the proposed amendment. We do not, however, have the benefit of a proposed amended answer by which to gauge the trial court's actions.[12]

For the sake of completeness and for possible benefit on retrial we will briefly address the arguments that swirl around the statute of limitations. Defendants seem to argue, based on one sentence in their discussion and recitation of considerable facts, that the evidence of delay was so

---

[11](...continued)
the misled party refused to read or even examine.

[12]Defendants appear to argue more than one "applicable" statute.

pervasive and one-sided that they should have been granted a directed verdict holding that plaintiffs' suit was untimely. We respectfully disagree based on the stringent standards for granting directed verdicts and review of directed verdicts. Defendants couple the directed verdict issue with an argument that considerable evidence of delay was admitted into evidence at trial, and that the court should have allowed the pleadings to be amended to conform to the evidence under Tenn. R. Civ. P. 15.02. Part and parcel of defendants' argument is that the timing was "not relevant to any other issue in Plaintiffs' case." We, again, disagree. Timing issues abounded in this trial. Defendants tried to persuade the jury that it was ludicrous for plaintiffs to say there was an agreement to reconvey when they stood to the side and allowed defendants to carry the burden of the payments for years and years. Often, questions of delay were explained away by the mention of the lease which was part of the case plaintiffs submitted. Moreover, since the plaintiffs objected to the motion to amend at every opportunity before and after trial, we are not inclined to agree that they consented to trial of that issue.

Plaintiffs devote much of their brief to the proposition that failure to raise the statute of limitations defense as an affirmative defense in the answer constitutes a permanent waiver of the issue. Plaintiffs rely on ***George v. Building Materials Corp.***, 44 S.W.3d 481 (Tenn. 2001). ***George*** does not stand for the broad proposition plaintiffs advance. In ***George***, a workers' compensation case, the defendant first tried to raise the limitations defense in a pleading filed on Friday before a Monday trial. ***George***, in fact, recognizes "that if the opposing party is given fair notice of the defense and an opportunity to rebut it, failure to specifically plead a statute of limitations defense will not result in a waiver." ***Id***. at 487. This is true even if the attempt to amend is as late as trial. ***Id.*** Any suggestion that failure to raise the defense in the original answer works a waiver once and for all flies in the face of Tenn. R. Civ. P. 15, and is simply wrong.

We will summarize and reiterate our thoughts on the statute of limitations for the sake of clarity. Defendants are free to file their motion to amend to plead the defense and argue it to the trial court. We do not say whether it must be granted or denied, but it should be evaluated in light of Rule 15, rather than a rule of blanket waiver. It was not tried by consent in the last trial and did not require a directed verdict.

IV.

The judgment of the trial court is vacated. Costs on appeal are taxed to the appellees, Arlie Overton, Novella Overton, Shairon Fay Howard, Paul David Howard, Derita Kay McCulloch, Casey McCulloch, Arlie Dennis Overton and Karen Overton. This case is remanded to the trial court, pursuant to applicable law, for further proceedings.

_____

CHARLES D. SUSANO, JR., JUDGE